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May 14, 2008

AGENDA ITEM 3b

TO: MEMBERS OF THE HEALTH BENEFITS COMMITTEE

I. SUBJECT: Assembly Bill 2158 (Soto) - As Amended April 22, 2008

Blood-borne or Airborne Diseases

II. PROGRAM: Legislation

III. RECOMMENDATION: Oppose, unless amended

This bill would require CalPERS to create and administer a new health benefit program for specified individuals. CalPERS should seek amendments that place this legislation in the relevant Labor Code, rather than impacting PEMHCA.

IV. ANALYSIS:

Summary

This bill provides that if a state employee's dependent or former dependent contracts a blood-borne or air-borne infectious disease from the employee, he or she may be compensated for health care costs associated with the disease. If the dependent elects to receive this benefit, the bill provides that he or she may not bring civil action against the state.

Background

The Public Employees Medical and Hospital Care Act (PEMHCA)

The California Legislature passed the Public Employees' Medical and Hospital Care Act (PEMHCA) to promote increased economy and efficiency in public service, and to enable public employers to attract and retain qualified employees by providing health benefit plans similar to those provided by employers in the private sector. By providing these benefits, the State also protects the investments made in permanent public employees by preserving and promoting good health. CalPERS administers PEMHCA and is the third largest purchaser

of health care in the nation, providing benefits to more than 1.2 million public employees, annuitants, and their families.

State employees and annuitants are eligible for health benefits coverage under PEMHCA. Eligible members select a plan based on their personal and familial needs and may enroll the following family members under specified conditions:

- Spouses or domestic partners. Former spouses and former domestic partners are specifically not eligible.
- Children, adopted children, or stepchildren under age 23 and never married, regardless of whether or not they live with the member.
- Children over age 23, who have never married and are incapable of self-support due to a mental or physical condition that existed prior to age 23.

Workers' Compensation Insurance

Under the workers' compensation system, employees are entitled to receive prompt, effective medical treatment for on-the-job injuries no matter who was at fault and, in return, are prevented from suing their employers over those injuries. Treatment is specific to the injury or illness sustained on the job, and the employer pays for the medical care through a workers' compensation insurance policy, or by being self-insured. The claims administrator pays the medical bills, and therefore, does not impact the employee's main health care coverage. The State of California is legally uninsured and has a master agreement with State Compensation Insurance Fund (SCIF) to manage the State workers' compensation claims, including payment of medical bills. Workers' compensation does not provide coverage for dependents.

Blood-borne Disease Standards

Workers in many different occupations are at risk of exposure to blood-borne pathogens, including Hepatitis B, Hepatitis C, and HIV/AIDS. In 1991, the Occupational Safety and Health Administration (OSHA) issued the Blood-borne Pathogens Standard to protect workers from this risk. In 2001, in response to the federal Needlestick Safety and Prevention Act, OSHA revised the Blood-borne Pathogens Standard. The revised standard clarifies the need for employers to select safer needle devices and to involve employees in identifying and choosing these devices. The updated standard also requires employers to maintain a log of injuries from contaminated sharps.

Provisions for Blood-borne Diseases under Workers' Compensation

Labor Code Section 3212.8 creates a disputable presumption that a blood-borne infectious disease that develops or manifests itself during a period while a specified safety officer is in the service of employment, arises out of and in the course of employment. It also provides that this presumption extends to an individual after employment for a period of three months for each year of service,

but not to exceed 60 months, starting with the last day worked in the specified capacity. This section also defines a blood-borne infectious disease as a disease caused by exposure to pathogenic microorganisms that are present in human blood that can cause disease in humans, including those pathogenic microorganisms defined as blood-borne pathogens by the Department of Industrial Relations. This statute applies only to safety employees.

Proposed Changes

Assembly Bill (AB) 2158 adds Section 22878.3 to the Government Code in the Public Employees' Medical and Hospital Care Act, which would:

1. Provide that if a specified state employee or annuitant contracted a blood-borne or airborne infection as a result of a work-related event and subsequently transmitted that disease to a dependent, as specified, that dependent, or former dependent, may receive health care benefits from the state sufficient to cover all of the costs related to treating the disease;
2. Specify that if a dependent, or former dependent, elects to receive such benefits, that election will constitute the sole and exclusive remedy of the dependent against the employer and that the dependent may not bring civil action against the state;
3. Define "former dependent" to mean a person who was diagnosed with a blood-borne disease which was contracted from a specified state employee while a dependent of that person, but the dependency relationship has terminated;
4. Declare the Legislature's intent that these provisions apply retroactively.

Legislative History

2004 AB 1324 (Steinberg) - Provided that an employee's dependent or former dependent who contracts a blood-borne infectious disease from the employee may be compensated for health care costs associated with the disease. Governor Schwarzenegger vetoed the bill, citing his concerns that the bill established a dangerous precedent by expanding workers' compensation benefits to non-employees as an alternative for health care coverage. The Administration's position was that extending those benefits to dependents of employees, even in the narrow manner proposed in this bill, is beyond the constitutional requirement of the workers' compensation system. *CalPERS Position: No Position*

- 2002 AB 2131 (Leonard) – Provided that if an employee covered by the blood-borne infectious disease presumption contracts a blood-borne infectious disease, and his or her dependent contracts the disease from the employee, the dependent shall be compensated for all medically-necessary health care costs associated with the disease for the duration of the disease. This bill was gutted and amended to address another issue. *CalPERS Position: No Position*
- 2001 Chapter 833 (AB 196, Correa) - Eliminated the requirement that certain law enforcement officers, firefighters, and probation employees bear the burden of proof in establishing a blood-borne infectious disease presumption for the purpose of receiving disability retirement benefits, and expands the scope of the term "injury" to include a blood-borne infectious disease for the purpose of receiving workers' compensation benefits. CalPERS did not have a position on this bill. *CalPERS Position: No Position*

Issues

1. Arguments by Those in Support

Peace officers, firefighters, and health caregivers have a higher risk of exposure to conditions such as Hepatitis-C, HIV and other blood-borne and airborne diseases than individuals in other occupations. While workers' compensation protects employees who contract diseases while on the job, it does not protect their dependents that may contract the disease from the employee.

Organizations in support: California Correctional Supervisors Organization, California Narcotic Officers Association, California Peace Officers Association, California Statewide Law Enforcement Association

2. Arguments by Those in Opposition

There is no known opposition at this time.

3. The Case of Chelsea Lewis

In 1982, Trisha Lewis, then a prison guard at San Quentin Prison, unknowingly contracted Hepatitis-C as a result of an injury during a prison riot. This pathogen had not even been identified at that time. Ms. Lewis did not discover that she had been infected until 1999, and had given birth to two children in that period. Her children were also tested and it was discovered that her 14-year old daughter Chelsea had also contracted the disease. Later this year, Chelsea Lewis will turn 23 and will no longer be eligible to receive health benefits as a dependent on her parent's non-CalPERS health insurance. Given her condition, it would be difficult, if not actually impossible

for Chelsea Lewis to obtain health care coverage under any individual health plan.

4. Expansion of Benefit and Exposure of State Jeopardy

This bill would establish the payment of benefits to former dependents that contracted specified diseases from state employees or annuitants. Once established, the concept could be further extended to encompass individuals that were never related to, nor dependent upon, infected state employees or annuitants, but may have also contracted the disease. This could potentially lead to significant further claims against the State.

5. Labor Code Section 3212.8 Does Not Cover Air-Borne Pathogens

Airborne pathogens differ from blood-borne pathogens in that they are spread by inhalation of the germ. Meningitis, influenza, pneumonia, and tuberculosis are all examples of diseases transmitted through the air. An infectious person's coughing or sneezing can send tiny droplets of moisture into the air that contain the pathogen. Depending on the environment, these contaminants can remain airborne for several hours.

Individuals who are around an infectious person on a regular basis, such as family members and coworkers, are more susceptible to airborne pathogens than someone who experiences a single isolated exposure. By including airborne pathogens, AB 2158 would possibly save the state from a larger number of potential lawsuits, but at the same time, it could create a much larger potential pool of individuals that could demand health care coverage from the state.

6. Provisions of this bill do not fit within the CalPERS health program

The theory driving AB 2158 is that the state should take responsibility for the health care coverage of an individual because his or her specific condition, which needs medical care and has rendered them otherwise uninsurable, was the indirect result of an on-the-job injury of a public employee.

Placement of these provisions within PEMHCA appears to seek the provision of benefit coverage under the state's comprehensive health care programs for treatment of specific conditions for former dependents of state employees or annuitants after the dependency relationship has terminated.

The CalPERS program is intended to provide comprehensive medical coverage for all employees or annuitants, and their dependents until the dependency relationship is ended. It is not intended to cover singularly-identified health care issues, nor provide coverage after the dependency has terminated. This bill would set significant precedents of providing

comprehensive medical coverage for selected health situations and benefits to individuals who are not otherwise eligible.

7. SCIF appears better suited to administer this benefit

As stated earlier, CalPERS provides comprehensive medical insurance rather than coverage and direct billing capabilities for the treatment of a single episode of illness. SCIF, on the other hand, is the State's workers' compensation claims administrator and would appear to have the systems in place to administer this benefit.

The author's office is considering amending the bill in Appropriations to move the responsibility for this benefit to SCIF.

8. Determination of Eligibility

The final arbitrator as to whether a state employee has a work-related blood-borne or airborne disease falls to the Workers' Compensation Appeals Board. This bill, however, is silent as to how and who makes the determination whether an infected state employee transmitted that disease to a dependent. Staff suggests SCIF be responsible for the final determination on eligibility.

9. Legislative Policy Standards

The Board's Legislative Policy Standards indicate an oppose position on proposals which would create unreasonable costs or complexity for the administration of the system. The Standards also indicate opposition to proposals that threaten the integrity of the PEMHCA purchasing pool concept.

Staff recommends the Board adopt an Oppose, unless amended position on AB 2158. The amendment should place this legislation in the relevant Labor Code, not within PEMHCA.

V. STRATEGIC PLAN:

This is not a product of the CalPERS strategic plan, but an ongoing responsibility of the CalPERS Office of Governmental Affairs.

VI. RESULTS/COSTS:

Program Costs

If a state employee or annuitant with an industrial blood-borne or airborne disease transmits the disease to his or her dependent, the State of California would be responsible for paying 100 percent of the dependent's medical cost associated with the disease. SCIF does not currently have the ability to track and quantify how many employees were treated for industrial blood or air borne

diseases. Consequently, besides Chelsea Lewis, it is difficult to estimate how many individuals would qualify for benefits under this legislation each year. One case, however, could have a major fiscal impact.

Administrative Costs

CalPERS should not incur administrative costs. As CalPERS recommends placement of this legislation in the relevant labor code and not within PEMHCA, the associated administrative responsibility should also be assigned to the relevant government agency and not to CalPERS.

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